SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 902

MICHAEL V. SCIORTINO,

Petitioner,

—v.—

THE HONORABLE ROBERT C. ZAMPANO,
UNITED STATES DISTRICT JUDGE,

Respondent.

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In opposing the grant of certiorari in this case, the Government (1) attempts to eliminate the conflict between the decision of the court below in this case and the decision of the District of Columbia Circuit in *Ross* v. *Sirica*, 380 F. 2d 557 (D. C. Cir. 1967) (1a),[1] but (2) makes no comment at all upon the impact on the administration of criminal justice of the Government's widespread practice of avoiding Rule 5 hearings.

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[1] References are indicated as follows:

References to the numbered pages of petitioner's Petition for Writ of Certiorari (Pet.);

References to the numbered pages of the appendix to the Petition for Writ of Certiorari (a);

References to the numbered pages of the appendix to the Reply Brief for Petitioner (b);

References to the numbered pages of the Government's Memorandum (Govt. Memo.).

By way of reply, petitioner urges these points:

1. To avoid a conflict between the decision in this case and the decision in *Ross*, the Government reads *Ross* as ascribing no discovery function to the Rule 5 hearing (Govt. Memo. 4-5). This, of course, ignores the clear language of the opinion. *Ross* v. *Sirica*, *supra*, 380 F. 2d at 559 (10a).

Moreover, the Government's own view of *Ross*—that it merely permits an opportunity "to test the evidence on which that finding [of probable cause by the commissioner] is based" (Govt. Memo. 5)—concedes the discovery function of Rule 5. If *Ross* permits such a "test [of] the evidence", even after the grand jury has returned an indictment, *Ross* has to stand for precisely what it says: that Rule 5 affords an accused "'a chance to learn in advance of trial the foundations of the charge and the evidence that will comprise the government's case against him.'" *Ross* v. *Sirica*, *supra*, 380 F. 2d at 559 (10a).

The conflict, then, is real. The separate statements denying an *en banc* rehearing (15a-33a) do not minimize that conflict. On the contrary, the court's action denying rehearing indicates a majority of the active judges did not desire to disturb the panel opinion in *Ross*.

2. Significantly, the Government offers no comment upon its widespread efforts to frustrate Rule 5's command that the commissioner "shall" hear the evidence after an accused is arrested. The manner in which the elimination of the Rule 5 hearing is accomplished in one busy district was detailed earlier (Pet. 9, n. 3). Since the decision in petitioner's case, there has been recognition in Connecticut that the right to a Rule 5 hearing, contrary to the clear command of the Rule, is now illusory. As U. S. Commissioner Brewster recently stated in a memorandum filed the day after the petition in this case was docketed:

> "If the United States Commissioner is charged under Fed. R. Crim. P. 5 (b) to tell the accused at the time of presentation after arrest that he has the right to a preliminary hearing, and that right can later be arbitrarily frustrated by the Government the result I believe is extremely unbecoming to the judicial system in the District" (6b).[2]

As the Commissioner's memorandum clearly indicates, the Government, in reliance on the decision of the court below, will immunize from judicial scrutiny a practice whereby preliminary hearings are avoided through continuances granted routinely until mooted by an indictment.

Conclusion

Unhampered by review by this Court, the decision of the court below will sanction the flagrant violation of Rule 5's clear command that once an accused is arrested he must be presented before a commissioner who "shall" hear the evidence.

For these reasons and for the reasons advanced in the petition, then, this Court should—and petitioner requests that it does—issue its writ of certiorari to review the judgment of the court below.

Respectfully submitted,

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January 18, 1968

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[2] Commissioner Brewster's memorandum describing the Government's means of frustrating Rule 5 rights in the District of Connecticut is set forth as an appendix to this brief (1b).

APPENDIX

Memorandum of Proceedings Before U.S. Commissioner Brewster

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF CONNECTICUT

UNITED STATES OF AMERICA,

vs.

ALTAMESE SHIPMON and HUEY JONES.

Commissioner's Docket No. 1

Case Nos. 271 and 272

December 8, 1967

PROCEEDINGS BEFORE UNITED STATES COMMISSIONER

"Warrants of arrest were issued for ALTAMESE SHIPMON (Exhibit A) and HUEY JONES (Exhibit B), both of Hardscrabble Road, Croton Falls, New York, on December 1, 1967 on complaints filed by Thurl Stalnaker, Special Agent, Federal Bureau of Investigation, charging violations of Title 18, United States Code, Section 1952(a)(3) and Title 26, United States Code, Section 4411 and Section 7203. Both were arrested on December 2, 1967 (not December 3, 1967 as stated in the return on Miss Shipmon's warrant) and were presented before me on the afternoon of Decem-

ber 2, 1967 in Danbury, Connecticut. Both were advised of their rights pursuant to Fed. R. Crim. P. 5(b), and found indigent under the Criminal Justice Act. With the consent of the Assistant United States Attorney, Samuel J. Heyman, all charges under Title 26 were dismissed at the time of presentation, on the grounds that there was insufficient evidence to require purchase of the occupational tax stamp in Hartford, Connecticut. At the time she was presented Miss Shipmon stated that she was presently unemployed but had a job in the State of Florida and wanted to be free to go to this job on December 22, 1967, and therefore wanted the criminal charges resolved as soon as possible.

Since both Miss Shipmon and Mr. Jones requested that one lawyer be appointed to represent both of them, Gerald Frauwirth of Bridgeport was appointed on December 4, 1967 to represent both defendants (Exhibit C).

On December 5, 1967 Mr. Frauwirth called the United States Commissioner and requested a preliminary hearing. The United States Commissioner on December 5, 1967 telephoned the Assistant United States Attorney, Mr. Heyman, and told him that Mr. Frauwirth wanted a preliminary examination under Fed. R. Crim. P. 5(c) and asked Mr. Heyman to arrange a convenient time with Mr. Frauwirth. Mr. Heyman agreed and said that he would call Mr. Frauwirth.

On December 7, 1967 early in the morning, Mr. Frauwirth called the United States Commissioner to ask again for a date for the preliminary examination and said that his client wished to go to Florida to take up employment and would like the opportunity to be heard on the issue of probable cause immediately. The United States Commissioner called the Assistant United States Attorney, Mr.

Heyman, who said that he was not going to have any preliminary hearing and would under no circumstances present evidence if one was scheduled because (1) the defendants were out on bond, and (2) the Grand Jury was going to meet on December 11, 1967. The United States Commissioner said to Mr. Heyman that if defense counsel requested it, a preliminary hearing would be scheduled this week.

On December 8, 1967 at 9:30 a.m., Mr. Frauwirth, counsel for the accused, again called the United States Commissioner requesting a preliminary examination and said that he and his clients were available at any time during that day. The United States Commissioner told Mr. Frauwirth to call the Assistant United States Attorney and arrange a time, but that the United States Commissioner would be available all day and suggested 2:30 p.m.

The Assistant United States Attorney, Mr. Heyman, called me about 10:30 a.m. and represented to me that Mr. Thurl Stalnaker, the Special Agent of the F. B. I. in charge of the case, would be in Bethany, Connecticut at the Chiefs of Police Academy until 4:00 or 4:30 in the afternoon of December 8, 1967 and therefore would be unavailable until that time; the United States Commissioner suggested that the preliminary examination be held at 4:00 or 4:30. Mr. Heyman said that he would not be available after 4:00 p.m. on December 8, 1967, and that no lawyer in his office would be available to conduct the preliminary hearing after 4:00 p.m. In any case, Mr. Heyman stated that he was sticking to his position that no evidence would be put on by the Government on December 8, and that he would be available at 2:30 p.m. to put that on the record.

The United States Commissioner contacted Mr. Frauwirth's office to notify Mr. Frauwirth that the hearing was

set for 2:30 p.m., and in view of the intention of the Assistant United States Attorney to offer no evidence, the presence of the two accused was not required.

At the hearing scheduled at 2:30 p.m., the Assistant United States Attorney offered no evidence and stated that his only witness was busy at the Chiefs of Police Academy in Bethany, Connecticut, twenty minutes from the Courthouse, and was therefore not available until five o'clock, after which time no lawyer in the United States Attorney's Office was available to proceed with the hearing.

Fed. R. Crim. P. 5(c) states

> "If a defendant does not waive examination, the Commissioner shall hear the evidence within a reasonable time."

The purpose served by a preliminary hearing is to determine whether there is sufficient evidence as to warrant a defendant being held in custody or on bond to await action of a Grand Jury. *Boone* v. *United States,* 185 F. Supp. 411 (D. C. Ky. 1960) affirmed 280 F. 2d 911 (6th Cir. 1960). Of course, a continuance may be granted to either prosecution or defense for good cause shown. *United States* v. *Gray,* 85 F. Supp. 436 (D. C. D. C. 1949). And the Government has a right to a reasonable time to prepare its case. *United States* v. *Universita,* 192 F. Supp. 154 (S. D. N. Y. 1961). In the Manual for United States Commissioners prepared by a committee chaired by the Honorable Carroll C. Hincks of this Court, the following appears on page 9 under the heading Conduct of Preliminary Examination:

> "The defendant is not required to plead (Rule 5(c)). If preliminary examination has not been waived by

the defendant, the Commissioner should generally proceed forthwith, but if a postponement is requested by one side or the other to permit the attendance of witnesses or counsel, the Commissioner at any stage of the proceedings may postpone or continue the hearing for such a time as considerations of fairness to the defendant and the public interest require."

In view of the representation of the Assistant United States Attorney that the cases of the two here accused will be presented before the Grand Jury on December 11, 1967 and, if a true bill is returned, bench warrants will be requested, little in the interests of the accused or the public will be accomplished by dismissing the two Commissioner's warrants at this time. I believe, however, that a representation that an agent of the Federal Bureau of Investigation is unavailable because he is at a police academy twenty minutes from the Courthouse, and that therefore the United States Government cannot be expected to proceed is without merit. The agent was neither ill nor out of the State. Moreover, when for four days the Government knew that the accused was demanding the preliminary hearing and evaded the requests of the accused, this Commissioner believes that the rights of the accused to a preliminary examination for which at the time of his arrest and presentation had been expressly told by the United States Commissioner, as directed in Fed. R. Crim. P. 5(b) (1966), that they had the right, have been injured.

Sciortino v. *Zampano,* United States Court of Appeals for the Second Circuit, November 3, 1967, holds that the right to a preliminary examination under Fed. R. Crim. P. 5(c) expires when the accused is indicted. It does not hold that the Government has no further duties to have preliminary hearings under that Rule.

If the United States Commissioner is charged under Fed. R. Crim. P. 5(b) to tell the accused at the time of presentation after arrest that he has the right to a preliminary hearing, and that right can later be arbitrarily frustrated by the Government the result I believe is extremely unbecoming to the judicial system in this District.

Judge Hincks' rule quoted above seems the wise one. A preliminary examination under Fed. R. Crim. P. 5(c) should proceed forthwith upon initial presentation unless postponement is requested by either side either (1) to permit attendance of witnesses or (2) to permit attendance of counsel. In these cases the accused were unrepresented at the time of initial presentment and requested a postponement until counsel be appointed under the Criminal Justice Act. At the time set down counsel for the Government and for the accused were present; the Government's witness was twenty minutes from the Courthouse. The Assistant United States Attorney had known about the case for more than a week and had known of the accused's request for a preliminary examination for four days. There was no reason whatsoever why the Government could not have gone forward.

Counsel for the accused requests that the warrants be dismissed. I do not believe in view of the announced intention of the Assistant United States Attorney to present these cases to the Grand Jury on December 11, 1967 that the interests of the accused would be sufficiently served by dismissal to deny the present request of the Government for a postponement at this late date. I must assume that the refusal of the Assistant United States Attorney to present evidence for the Government on December 8, 1967 constitutes a request for a continuance. The continuance will therefore be granted until December 11, 1967.

The Commissioner accepts full responsibility for this injury to the defendants: in short, I incorrectly assumed after calling the Assistant United States Attorney on December 5, 1967 that a convenient time for the preliminary examination would be set by the Assistant United States Attorney and the counsel for the accused.

Since for the reasons above stated the way that the Government has handled these cases does not comport with this Commissioner's understanding of the spirit and letter of Fed. R. Crim. P. 5 and the quoted rules written by Judge Hincks, I asked that a copy of this statement of proceedings be transmitted to the Chief Judge in the hope that guidelines will be set by him and the Judges in this District. This is particularly urgent since, as predicted by Professor Moore, 8 *Moore, Federal Practice* 5-32 (1965), the rights of accused under Fed. R. Crim. P. 5(c) are now as never before being given the "vigorous test" by counsel now appointed at this early stage in the proceedings under the Criminal Justice Act.

A transcript of the proceedings before this United States Commissioner on December 8, 1967 is available from Harold J. Moan, Court Reporter, New Haven, Connecticut.

Copies of this statement of proceedings before United States Commissioner were today sent to Gerald Frauwirth, Samuel J. Heyman, the Hon. William H. Timbers, Chief Judge, and were filed in the Clerk's Office of the United States District Court in New Haven, Connecticut.

Dated at New Haven, Connecticut this 12th day of December 1967.

/s/ CARROLL W. BREWSTER
Carroll W. Brewster
United States Commissioner

[Exhibits omitted]

UNITED STATES OF AMERICA,
DISTRICT OF CONNECTICUT, *ss.*:

I, GILBERT C. EARL, Clerk of the United States District Court for the District of Connecticut, do hereby certify that the annexed and foregoing is a true and full copy of the original Proceedings Before United States Commissioner filed in Criminal Case No. 12,117, entitled United States of America vs. Altamese Shipmon and Huey Jones, et als., on December 12, 1967, now remaining among the records of the said Court in my office.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the seal of the aforesaid Court at New Haven this 21st day of December, A. D. 1967.

GILBERT C. EARL,
Clerk.

By .....
Deputy Clerk.

[SEAL]